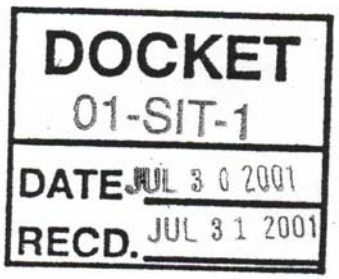
COMMUNITIES FOR A
BETTER
ENVIRONMENT

July 30, 2001

Docket Unit
California Energy Commission
1516 Ninth Street MS-4
Sacramento, CA 95814
BY OVERNIGHT DELIVERY



Re: Docket No. 01-SIT-1

Dear Docket Unit:

Enclosed please find the original and eleven copies of the comments of Communities for a Better Environment and nine other organizations on the Initial Draft Modifications in the above rulemaking proceedings. Copies were also transmitted via e-mail this afternoon to the Docket Unit and Richard Buell.

Thank you for your assistance.

Sincerely,

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Senior Attorney

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STATE OF CALIFORNIA
Energy Resources Conservation
And Development Commission

In the Matter of:	Docket 01-SIT-1
RULEMAKING TO MODIFY RULES OF PRACTICE AND PROCEDURE FOR POWERPLANT APPLICATIONS	**Comments of Ten Intervenor and Community Groups**

Communities for a Better Environment, Our Children's Earth, Southeast Alliance for Environmental Justice, Bayview Hunters Point Community Advocates, Environmental Defense, Environmental Health Coalition, Friends of the River, Global Exchange, Literacy for Environmental Justice, and West County Toxics Coalition ("Community Commenters") submit these comments on the changes to the Commission's procedures that are proposed in the Initial Draft Modifications

to Siting Regulations in this rulemaking proceeding.[1] Most of the proposals sweep far too broadly, vastly and unnecessarily increasing the discretion of the presiding member and setting the stage for stifling public participation in the siting process and perpetuating environmental injustice. The proposals also run afoul of the California Environmental Quality Act, Pub. Res. Code § 21000 *et seq.* The Commission should reject most of the proposals, and revise some of them to focus on only the problem that needs to be solved.[2]

These comments address the proposed revisions section by section.

Section 1212

Taken together, the proposed revisions to subsections (b) and (c) and the proposed addition of subsection (e) would vest almost unlimited discretion in the presiding member to eliminate the most basic aspects of participation in Energy Commission proceedings, including the ability to present testimony and cross-examine witnesses. This extraordinary expansion of discretion is not accompanied by *any standards at all* that would govern the exercise of that discretion. Basing the hearing procedure on the standardless discretion of the presiding member opens the door to inconsistent and arbitrary application of the restrictions on participation set forth in the proposed revisions to the rules, and raises the specter of discriminatory exercise of the broad discretion created.

1212(b)

The proposed revision should be changed to read:

All testimony offered by any party shall be under oath. The presiding member may require parties to docket and serve their testimony in written form in advance of the

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[1] Communities for a Better Environment, Our Children's Earth, and Southeast Alliance for Environmental Justice are intervenors in current Energy Commission siting proceedings. See Attachment A for brief descriptions of the other commenting organizations.

[2] Sections 1212(c), 1212(e), 1712(b), 1714.5 should be rejected; sections 1212(b), 1710(a), and 1710(h) should be revised.

hearing so that hearings may be more efficiently conducted.

The provision of written testimony in advance can be a valuable tool in managing a hearing and allowing the parties to prepare useful and relevant cross-examination questions. The submission of written testimony should, however, either be required or not required in each case; therefore, the proposed language to "encourage" submission of written testimony should be eliminated. In addition, the ambiguous word "present" should be eliminated. Written testimony, like other documents, should be docketed and served on all parties in advance of the hearing, or it will not aid effectively in hearing preparation.

All other proposed revisions to this subsection should be rejected. They create a pseudo-summary judgment procedure, but with none of the rules, standards, or procedural safeguards that accompany the summary judgment procedure in a court. See CCP § 437 (c); Robert I. Weil and Ira A. Brown, Jr., *Civil Procedure Before Trial* (1994 and Supp.), ch. 10. Summary judgment in court also follows the right to discovery, which includes the examination of witnesses in deposition, a procedure not permitted by the Energy Commission. See CCP § 437 (h).

The potential for arbitrary exercise of the power to restrict or eliminate cross-examination is very serious. There may well be disputed issues of fact that can be brought out through cross-examination of the staff without the need for the submission of written testimony by other parties, which could cost significant effort and expense, out of the reach of many intervenors. For example, in the San Francisco Energy Company case (Docket No. 94-AFC-1), it came out in cross-examination that staff's comparative San Francisco health analysis had included within Southeast San Francisco areas of San Francisco geographically and demographically distinct from the impacted community, such as the Mission district and parts of the Castro community, thus making the results unreliable—a fact not disclosed by the written testimony.

Additionally, since the proposal as drafted (with the "may encourage. . . testimony in writ-

ten form" language) allows some testimony to be written and other testimony to be oral only, an intervening party who intends to rely on oral testimony may suddenly find that not only is the oral testimony precluded, but so is cross-examination, because the presiding member decided on the basis of the written testimony that was submitted to eliminate oral testimony and cross-examination.

The proposed changes are also contrary to sound and well-tested policy on the conduct of hearings. Only an evidentiary hearing can resolve conflicts in written testimony and resolve factual or technical disputes. Cross-examination is a key component of an evidentiary hearing. As stated by the leading treatise on evidence, "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." 3 A. J. Wigmore, Evidence @ 940, at 775 (James H. Chadbourn rev. 1970), cited in *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The Legislature has made clear that it is not the prerogative of state agencies to shield the truth from the people:

> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Govt. Code § 11120.

The Legislature provided that intervenors may request cross-examination. Pub. Res. Code § 25214. Indeed, cross-examination and the presentation of witnesses were deemed so important by the legislature for this kind of proceeding that other parties are guaranteed these rights. Pub. Res. Code § 30413(e). The Commission for decades has affirmed that cross-examination is an essential element for this kind of proceeding through the very regulations now proposed to be changed, a decision left undisturbed by the Legislature, and indeed the proposed revisions continue

to recognize this right.

If the Commission is concerned about abuses of cross-examination and the presentation of witnesses, it should not proceed with such a broad-brush approach. The judicious use of prehearing conferences, provided for in § 1718.5 of the Commission's regulations, will enable the parties to learn about the hearing process, to identify potentially contested areas and possible witnesses, to alert the presiding member and the hearing officer to potential evidentiary issues, and to prepare their presentations more effectively. Prehearing conferences can also be a forum in which to set the ground rules for the evidentiary hearing, with time for the parties to understand the rules and conform to them.[3]

At the hearing itself, the hearing officer and the presiding member have the power to curb abuses and require efficient, relevant cross-examination. This sound policy approach is widely recognized and applied. For example, the Federal Rules of Evidence require:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Rule 611 (a), F.R.Evid.

The focus on "reasonable control" in the Federal Rules, rather than elimination or drastic curtailment of cross-examination, is necessitated by constitutional considerations. The Federal Constitution through the 14th Amendment protects the rights of parties to procedural due process before administrative agencies. Depending upon the nature of the hearing and the rights at issue, the right to cross-examination and the presentation of witnesses are considered part of the due pro-

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[3] Community Commenters are here assuming that prehearing conferences will be held with adequate notice and time for all parties to prepare for them, and that at least one conference will be held after the parties have had sufficient time to analyze the Final Staff Assessment. That is, we are assuming that the prehearing conferences will be used as a case management tool, not as a tool to make public participation at the hearing more difficult.

process protections. *Willner v. Committee on Character and Fitness* (1963) 373 U.S. 96. Where the right to cross-examination is provided, it may not be unreasonably curtailed, or the due process clause is violated. *Hegglin v. Workmen's Compensation Appeals Board* (1971) 4 Cal. 3d 162.

The proposed changes would, predictably, have their most severe impact on those intervening parties who have the fewest resources: *e.g.*, money, access to lawyers, access to technical experts. Their ability to contribute to the proceeding often develops later than the staff's or the applicant's, since intervening groups need time to find resources or develop their own expertise in the process. The proposed changes would have a disproportionate impact on intervening groups, by interposing the presiding member's standardless discretion between intervenors and their rights to present their case effectively in a certification proceeding. Such a drastic intrusion into the participation rights of members of the public can not be justified by concerns about efficient case management, since the Energy Commission's regulations already provide reasonable case management tools and a staff of hearing officers to help implement them successfully.

1212(c)

The proposed revision to this subsection should be rejected. The proposed revision makes explicit the inappropriate values implicit in the proposed changes to § 1212(b): in the name of "efficiency," the presiding member may arbitrarily eliminate the possibility of *any* participation in the hearing by a particular party or set of parties.[4] The supposed rights of the parties enumerated in this subsection are therefore not rights at all, but merely privileges to be granted or withheld in the discretion of the presiding member. There is no standard for the exercise of this discretion other than "efficiency." It would always, however, be more efficient not to have *any* cross-examination, or exhibits, or cantankerous witnesses. With only a spurious "efficiency" as a guide,

[4] "Subject to the presiding member's exercise of discretion in the conduct of an efficient hearing process, each party shall have the right to. . ."

any presiding member could simply shut off the legitimate participation of any intervenors in any siting hearing.

1212(e)

This proposed new subsection is not only misguided, but pernicious. It vests, yet again, unlimited and standardless discretion in the presiding member to eliminate completely, in any or all cases, the hearing procedures so carefully set out in the rest of the regulations. The "informal hearing procedures set forth in Government Code sections 11445.10 et seq." are so wildly inappropriate for considering the siting of a power plant of any size as to suggest that this revision is intended to allow the presiding member to prevent public participation and suppress relevant information in an arbitrary selection of cases.

The Legislature has given agencies the option of using the informal hearing procedure. It has made clear, however, that the informal procedure is not intended to be an actual hearing, as understood and defined in the existing Energy Commission regulations. Instead, "[t]he informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer." Govt. Code § 11445.10(b)(2). In other words, the informal hearing is one workshop with the presiding member in attendance, on the basis of which the siting proceeding will be decided.

This characterization of the process should be enough to mandate its rejection. However, the reasons to reject it are made even clearer by a more detailed examination of the legislation. The scope and type of situations where facts are in dispute that the Legislature thought suitable for application of the informal process include: a monetary amount in dispute of not more than $1,000; a disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days; or a disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than five days.

Govt. Code § 11445.20(b). A power plant costing nearly half a billion dollars, emitting hundreds of tons of pollution per year, and operating for 40 years is so far from those situations as to be completely incomparable to them. This attempt to shoehorn the participants in the Energy Commission's application for certification proceedings into a process meant for disputes with very little at stake can have no legitimate purpose and should be rejected.

Section 1212 as a whole

The proposed changes to Section 1212, taken together, are particularly troublesome because many project applications are in mixed-use or industrial areas near low-income communities and communities of color, in low-income rural areas, or in isolated communities of color. Subjecting communities of color to arbitrary and capricious restrictions on their right to participate in hearings, including conducting cross-examination, while others, particularly applicants whose boards are predominantly white, are allowed full rights to cross-examination and the presentation of testimony could violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. If the intention of the Commission is indeed to deprive these communities of their right to participate in these proceedings on an equal basis to other parties, it may also violate the equal protection clause of the 14th Amendment.

Adopting a broad-brush approach that would allow the Commission, through a series of decisions by individual presiding members, to segregate intervenors into a procedurally disfavored group in a manner that disproportionately impacts communities of color and low-income communities and ignores the particulars of their evidence and situations raises serious constitutional, federal statutory, and state statutory violations. Community Commenters therefore urge the Commission to reject the changes to section 1212, with the minor exception of a small revision to section 1212(b).

Section 1712

The proposed changes to § 1712(b), apparently intended to accompany the changes to §1212, are poorly drafted, confusing, and potentially eliminate all rights of intervenors to file documents in a siting proceeding.

The right to present evidence and cross-examine witnesses for all parties is contained in section 1712(b). The proposed change strikes "each" and substitutes "each intervening" before "party." The net effect is that the only parties with the ability to present testimony would be intervenors. While some intervenors may enjoy having the applicant and staff so constrained, Community Commenters agree with staff[5] that such a result can not be what is intended, and would be detrimental to the public interest.

We also note that poor drafting of the other proposed revision to this subsection could lead to the elimination of all intervenor participation in siting proceedings. It appears to make all activities of intervenors, not simply presenting witnesses, subject to revised section 1212 by placing the modifying phrase "as provided for in Section 1212" at the end of a list of actions that includes "fil[ing]motions, petitions, objections, briefs, and other documents." Since § 1212 does not cover such filings, this proposed revision could throw intervenors' participation into limbo while the presiding member, and ultimately the Commission, tried to figure out what it means.

These changes are wholly unnecessary and create new pitfalls for the conduct of siting proceedings. They should be rejected.

Section 1710

The proposed revision to subsection (h) is a significant overreaction to a relatively

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[5] See Staff Comments on the Initial Draft Modifications to the Siting Regulation and Suggested Additions and Alternatives (July 13, 2001) at 1.

small problem. As proposed, it would "solve" the problem of inconsistency in staff management of communication with applicants by allowing unlimited secret meetings between staff and applicants and eliminating, through the back door, the requirement now embodied in §1710(a) that all "presentations, conferences, meetings, workshops, and site visits shall be open to the public."

The discussion at the Siting Committee workshop on July 23 revealed that the current subsection (h) is subject to a variety of interpretations in practice by Energy Commission staff. Staff noted that, however varied its practice appears, its fundamental interest is in being able to obtain technical, factual information without the need of a public workshop. This interest (which is shared by all parties to a proceeding) could be accommodated by a revision that is much less far-reaching than the proposed change, and also is much less confusing than staff's proposals.[6] Community Commenters therefore suggest that the proposed new proviso in subsection (a) be retained, but that the exception it refers to in subsection (h) be revised as follows:

> **Nothing in this section shall prohibit any party from responding to an inquiry from any other party that seeks clarification of a factual matter presented in a previously docketed document, or from discussing purely procedural issues with any other party.**

The intent of this suggestion is to create a more precise exception to the general rule of public participation expressed in § 1710(a) that will more readily allow all parties to distinguish between appropriate private communications and inappropriate private deals.

[6] See Staff Comments at 1 and attachment.

The proposed revision as drafted, by contrast, would allow unlimited private deals between applicants and staff as long as staff eventually put notes about the communications in the docket.

The proposed revision will drastically erode public confidence in the legitimacy of the staff's work. Even without the blanket permission given by the proposal, staff and applicants often work out changes to projects that are not communicated to intervenors, much less to members of the public, until the applicant chooses to do—or is forced to do so because of a publicly noticed workshop or conference. With the freedom given to applicants to discuss absolutely anything privately with the staff that is guaranteed by the proposed revision, applicants will naturally lobby staff on all sorts of matters. Staff members will naturally be tempted to solve problems quickly with the applicant, rather than subjecting such "solutions" to the public scrutiny they require. An after-the-fact note in the docket will not cure the ill of such unlimited opportunities for private deals.

Moreover, the proposed revision would make subsection (h) an exception that swallows the rule of public notice and participation set forth in subsection (a). If any party is allowed to meet privately with any other party, subject only to a staff note of a meeting in which it participated, why would any presentations, conferences, meetings, or workshops ever be held? The staff and the applicant could do all their business in secret. The results of their private meetings would be memorialized in the Final Staff Assessment, but would not see the light of day prior to that point. There is no countervailing ability of intervenors or members of the public or even other public agencies to require the staff to hold any workshops or meetings.

The proposed revision thus offers the prospect that Energy Commission siting proceedings will begin with an Initial Hearing and end with an evidentiary hearing, with a vast

black hole in between. It is contrary to the intent of the Warren-Alquist Act and the Commission's long-standing regulations, and should be rejected.

Section 1714.5

The proposed addition of new subsection (d) accords not "great deference," but almost absolute conclusiveness, to the comments received from other state agencies on applications for certification. The Commission should reject this proposal, both because it is inconsistent with the Commission's responsibilities under CEQA, and because it leaves the Commission, applicants, and other interested parties at the mercy of the priorities and approaches of other agencies that have no regulatory responsibility for power plant siting.

The text of the proposed revision deserves careful scrutiny. It presents two different attitudes that the staff must take to the comments of other agencies, each of which taken alone would lead the Commission to fail in its obligations under CEQA. Taken together, they would eviscerate the application of CEQA in Energy Commission proceedings. First, the staff must give "great deference" to the recommendations of other agencies. Second, the recommendations of other agencies must be "deemed to represent the position of the State of California" unless the staff concludes that the recommendations are "in conflict with other laws of the State of California or of the United States." Whatever minuscule leeway the staff might have to exercise any independent judgment about the comments of other agencies under the "great deference" instruction is eliminated by the "position of the State of California" instruction.

Although the Commission has a certified regulatory program pursuant to Pub. Res. Code sec. 21080.5, it is not free to ignore CEQA's fundamental requirements. *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105. As a CEQA lead agency, the Commission must use its own "independent judgment and analysis." CEQA Guidelines § 15090, subd. (a)(3). It can not categorically defer to other agencies' opinions, as the proposed revision would

require.

The Community Commenters agree with the staff that this proposed change would prevent the staff from carrying out the obligation under CEQA to determine mitigation measures in order to substantially lessen or avoid otherwise significant adverse environmental impacts. Pub. Res. Code §§ 21992m, 21981(a).[7] "[I]n determining what kinds of mitigation measures are feasible and appropriate, a lead agency cannot refrain from considering means of exercising its own regulatory power simply because another agency has general authority over the impacted natural resource." Michael H. Remy, *et al.*, *Guide to the California Environmental Quality Act* (10th ed. 1999) at 55, citing *Citizens for Quality Growth v. Mount Shasta* (1988) 198 Cal. App. 3d 433, 443 n. 8. This obligation is recognized in other parts of the existing regulations, such as § 1742.5(d), which properly requires the staff to "supplement" other agencies' assessments on environmental issues as part of the Commission's evaluation of whether less environmentally harmful alternatives are available and whether feasible mitigation measures for unavoidable environmental impacts can be developed.

The legal inadequacy of the proposal is matched by its practical inappropriateness. Because of the Commission's exclusive powers in cases under its jurisdiction, other agencies are indeed merely "commenting." No matter how conscientious individual agency staff commenters may be, they are not exercising any agency authority for which they are responsible or taking any actions for which they or their agency is likely to be held accountable. The other agencies thus lack institutional incentive to make the careful review that CEQA and the Warren-Alquist Act demand of the Commission.

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[7] See Staff Comments, at 2.

The proposed revision would have the Commission abdicate one of its most important responsibilities, that of using its own judgment to decide on an application for certification. The Commission's ability to jettison this responsibility is, fortunately, constrained by CEQA. The Commission should adhere to its duties and reject this attempt to sidestep them.[8]

Other sections

The Community Commenters have no objections to the proposed changes to sections 1741, 1748, 1752, and 1755. They also have no objections to the proposed change to section 1751, as long as the explanation at the July 23 workshop that the words "hearing record" have the meaning they are given in § 1702(h) is incorporated into the change.

Dated: July 30, 2001

Respectfully submitted,

Anne E. Simon
Communities for a Better Environment

Alan Ramo
Environmental Law and Justice Clinic

[8] In an analogous attempt to short-circuit CEQA, the Resources Agency recently tried to revise sec. 15064 subd. (h) of the CEQA Guidelines to allow lead agencies to rely on the permitting standards of other agencies in determining whether an environmental effect was potentially significant under CEQA. This maneuver was invalidated by the Sacramento Superior Court in *Communities for a Better Environment, et al. v. California Resources Agency*, Sacramento Superior Court No. 00CS0030, (April 25, 2001), at 2-3, *appeal filed* July 17, 2001.

ATTACHMENT A

Bayview Hunters Point Community Advocates is a non-profit organization working to protect the economic and environmental health of the Bayview Hunters Point community in San Francisco.

Environmental Defense, a leading national nonprofit organization based in New York, with offices in Oakland and Los Angeles, since 1967 has linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

Environmental Health Coalition is a twenty-year-old environmental justice organization working to protect public health from toxic pollution in the San Diego-Tijuana region.

Friends of the River is a statewide river conservation group dedicated to preserving, protecting, and restoring California's rivers, streams, and their watersheds.

Global Exchange is a non-profit organization which has been working in response to the energy crisis to promote clean, affordable power under public control.

Literacy for Environmental Justice is a youth empowerment and environmental justice education organization located in Bayview Hunters Point in San Francisco.

West County Toxics Coalition is a non-profit organization in Richmond working to achieve environmental justice in Contra Costa County.